

UNITED STATES PATENT AND TRADEMARK OFFICE

SERIAL NO: 77/144094

MARK: DRUMLINE LIVE



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GENERAL TRADEMARK INFORMATION:

<http://www.uspto.gov/main/trademarks.htm>

TTAB INFORMATION:

<http://www.uspto.gov/web/offices/dcom/ttab/index.html>

APPLICANT: Halftime Live LLC

**CORRESPONDENT'S
REFERENCE/DOCKET NO:**

21535-2

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EXAMINING ATTORNEY'S APPEAL BRIEF

Applicant has appealed the examining attorney's final refusal to register the mark DRUMLINE LIVE on the ground that it is merely descriptive under Trademark Act Section 2(e)(1), 15 U.S.C. Section 1052(e)(1).

FACTS

On March 29, 2007, Applicant Halftime Live LLC filed an application based on an intent to use to register the mark DRUMLINE LIVE for "Entertainment services in the nature of live musical performances."

In an Office Action dated July 23, 2007, the examining attorney refused registration under section 2(e)(1) of the Trademark Act on the ground that the proposed mark is merely descriptive of the identified services. On January 23, 2008, applicant responded to the Office Action by disclaiming the term LIVE and presenting arguments against the refusal to register. The examining attorney subsequently issued a final refusal on 02/04/2008. Applicant filed a timely notice of appeal on July 28, 2008 and submitted an appeal brief on 09/26/2008.

The only issue on appeal is whether the proposed mark DRUMLINE LIVE is merely descriptive

of the identified services.

ARGUMENT

Registration is refused on the Principal Register on the ground that the mark is merely descriptive for the following reasons:

I. "DRUMLINE LIVE" IS MERELY DESCRIPTIVE

The proposed mark DRUMLINE LIVE merely describes the purpose or use of applicant's "Entertainment services in the nature of live musical performances."

A mark is merely descriptive under Trademark Act Section 2(e)(1), 15 U.S.C. §1052(e)(1), if it describes an ingredient, quality, characteristic, function, feature, purpose or use of the relevant goods and/or services. *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987); *In re Bed & Breakfast Registry*, 791 F.2d 157, 229 USPQ 818 (Fed. Cir. 1986); *In re MetPath Inc.*, 223 USPQ 88 (TTAB 1984); *In re Bright-Crest, Ltd.*, 204 USPQ 591 (TTAB 1979); TMEP §1209.01(b).

A. "DRUMLINE" Merely Describes A Type Of Musical Performance

"Drumline" is a common descriptive term for a group of percussion instruments that are usually played as part of a marching band. See website images attached to both the first office action and the final office action.

Material obtained from the Internet is generally accepted as competent evidence in examination and ex parte proceedings. See *In re Rodale Inc.*, 80 USPQ2d 1696, 1700 (TTAB 2006) (Internet evidence accepted by the Board to show genericness); *In re White*, 80 USPQ2d 1654, 1662 (TTAB 2006) (Internet evidence accepted by the Board to show false connection); *In re Joint-Stock Co. "Baik"*, 80 USPQ2d 1305, 1308-09 (TTAB 2006) (Internet evidence accepted by the Board to show geographic significance); *Fram Trak Indus. v. WireTracks LLC*, 77 USPQ2d 2000, 2006 (TTAB 2006) (Internet evidence accepted by the Board to show relatedness of goods); *In re Consol. Specialty Rest. Inc.*, 71 USPQ2d 1921, 1927-29 (TTAB 2004) (Internet evidence accepted by the Board to show that geographic location is well-known for particular goods); *In re Gregory*, 70 USPQ2d 1792, 1793 (TTAB 2004) (Internet evidence accepted by the Board to show surname significance); *In re Fitch IBCA Inc.*, 64 USPQ2d 1058, 1060 (Internet evidence accepted by the Board to show descriptiveness); TBMP

§1208.03; TMEP §710.01(b).

The following quotes from the Internet evidence attached to the final action are examples of the descriptive use of “drumline”:

“The ensemble is a full drum line (snare, tenor, bass, cymbals and pit).” See website image from The University of Texas at Arlington Public Affairs, www.uta.edu/public-affairs/pressreleases/page.php?id=1203 (accessed January 25, 2008).

“In the fall the group functions as the drum line for the Fighting Blues Marching Band and also performs with various marching bands in the area.” See website image from Washburn University, www.washburn.edu/cas/music/ensembles/percussion.html (accessed January 25, 2008).

“Nelly is holding auditions for an “All Girl” drum line to join him in a performance of *Grillz* during the BET Hip Hop Awards.” See website image from ProHipHop: Hip Hop Marketing & Business News, www.prohiphop.com/2007/09/nelly-seeks-all.html (accessed January 28, 2008).

B. “LIVE” Is A Descriptive Term For A Live Performance

The term “LIVE” merely describes a “live” musical performance. Applicant does not dispute this and in fact has apparently conceded that it is descriptive through its disclaimer of “LIVE.”

C. Applicant’s Services Include Live Performances By A Drumline

Applicant’s identified services are “Entertainment services in the nature of live musical performances.”

As indicated by the evidence attached to the office actions, a “drumline” provides a specific type of musical performance that may be performed live. Because the identification does not limit the type of live musical services in any way, applicant’s identified services of “live musical performances” include live performances by a “drumline.”

The nature and scope of a party’s goods or services must be determined on the basis of the goods or services recited in the application or registration. *See, e.g., Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1690 n.4 (Fed. Cir. 1993); *J & J Snack Foods Corp. v. McDonald’s Corp.*, 932 F.2d 1460, 18 USPQ2d 1889 (Fed. Cir. 1991); *Octocom Systems Inc. v. Houston Computer Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1990); *Canadian Imperial Bank of Commerce, N.A. v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987); *Paula Payne Products Co. v. Johnson Publishing Co.*, 473 F.2d 901, 177 USPQ 76 (C.C.P.A. 1973).

The determination of whether a mark is merely descriptive is considered in relation to the identified

goods and/or services, not in the abstract. *In re Abcor Dev. Corp.*, 588 F.2d 811, 814, 200 USPQ 215, 218 (C.C.P.A. 1978); TMEP §1209.01(b); *see, e.g., In re Polo Int'l Inc.*, 51 USPQ2d 1061 (TTAB 1999) (finding DOC in DOC-CONTROL would be understood to refer to the “documents” managed by applicant’s software, not “doctor” as shown in dictionary definition); *In re Digital Research Inc.*, 4 USPQ2d 1242 (TTAB 1987) (finding CONCURRENT PC-DOS merely descriptive of “computer programs recorded on disk” where relevant trade used the denomination “concurrent” as a descriptor of a particular type of operating system). “Whether consumers could guess what the product is from consideration of the mark alone is not the test.” *In re Am. Greetings Corp.*, 226 USPQ 365, 366 (TTAB 1985).

Applicant’s argument that it does not intend to offer live performances by a “drumline” is not persuasive because the identified services are worded broadly enough to include live “drumline” performances and in fact any type of live musical performance. Applicant does not appear to dispute that a “drumline” describes a group that provides a specific type of musical performance. Instead, applicant contends that the mark is not descriptive on the ground that it does not offer live performances by a “drumline.”

However, the determination of whether or not a mark is descriptive is based on the services as they are identified in the application. So, applicant’s contention that “Applicant is not applying to register its mark for use in association with a line of percussionists or services the Examiner considers to constitute a “drumline,”” is contradicted by applicant’s identification of services. Applicant has applied to register its mark for “live musical performances.” The scope of this wording is broad enough to include musical performances by a line of percussionists and in fact is broad enough to include any type of musical performance. It is not necessary for the identification to specifically mention that applicant provides live performances by a “drumline” for the applied-for mark to be descriptive. Descriptiveness is determined in relation to the identified services. In this case, a “live drumline” performance is a specific type of live musical performance. Applicant provides no explanation as to why its identification of services, “live musical performances,” should not be interpreted to include live musical performances by a “drumline.” Accordingly, applicant’s contention that its identification of services does not include “live drumline” performances must be rejected.

Applicant also incorrectly contends that the mark is not descriptive on the ground that applicant’s

musical performances will include more than just percussion instruments and that there will be entire performances that do not include percussion instruments. However, applicant's identification of services does not limit or even indicate a specific type of live musical performance and therefore the identification of services includes any and all live musical performances, including those of a "drumline."

Furthermore, applicant concedes that applicant's live performances will include percussion instruments. Therefore, even if applicant's services include more than just a performance of a "drumline," DRUMLINE LIVE still merely describes one attribute of the live musical performances. A term need not describe all of the purposes, functions, characteristics or features of the goods and/or services to be merely descriptive. For the purpose of a Section 2(e)(1) analysis, it is sufficient that the term describe only one attribute of the goods and/or services to be found merely descriptive. *In re H.U.D.D.L.E.*, 216 USPQ 358 (TTAB 1982); *In re MBAssociates*, 180 USPQ 338 (TTAB 1973); TMEP §1209.01(b). Applicant's identified services of "live musical performances" is worded so broadly as to include "live drumline" performances. In other words, the identification of services includes the performances of a "drumline live." Therefore, the mark DRUMLINE LIVE merely describes the identified musical performance services.

II. THE MARK IS NOT SUGGESTIVE AND OTHER MEANINGS OF MARK NOT RELEVANT

Applicant incorrectly contends that "DRUMLINE LIVE" is merely suggestive on the ground that it takes thought or imagination to determine the services because "drum" has meanings other than just a musical instrument. However, the term "drum" by itself is not at issue and applicant does not indicate what other meanings there might be for the entire mark DRUMLINE LIVE. In addition, the fact that a term may have different meanings in other contexts is not controlling on the question of descriptiveness. *In re Chopper Industries*, 222 USPQ 258 (TTAB 1984); *In re Bright-Crest, Ltd.*, 204 USPQ 591 (TTAB 1979); *In re Champion International Corp.*, 183 USPQ 318 (TTAB 1974); TMEP §1209.03(e). Furthermore, applicant provides no explanation as to why it would require thought or imagination to arrive at the conclusion that DRUMLINE LIVE merely describes a live musical performance featuring a drumline.

III. APPLICANT'S EVIDENCE OF EARLIER APPLICATION NOT MADE OF RECORD

Applicant's argument regarding the earlier filed application has not been considered because it has not been properly made of record. The record in an application must be complete prior to the filing of an appeal; however, applicant has submitted additional evidence with its appeal brief. Because the proposed evidence was untimely submitted, this evidence should not be considered. 37 C.F.R. §2.142 (d); *In re Fitch IBCA Inc.*, 64 USPQ2d 1058, 1059 n.2 (TTAB 2002); *In re Trans Cont'l Records Inc.*, 62 USPQ2d 1541, 1541 n.2 (TTAB 2002); TBMP §§1203.02(e), 1207.01; TMEP §710.01(c).

The Trademark Trial and Appeal Board does not take judicial notice of registrations or applications. *In re Delbar Products, Inc.*, 217 USPQ 859 (TTAB 1981); *In re Duofold Inc.*, 184 USPQ 638 (TTAB 1974). To make applications proper evidence of record, soft copies of the applications or the complete electronic equivalent (*i.e.*, printouts of the application taken from the electronic search records of the United States Patent and Trademark Office) must be submitted. TMEP §710.03. *See In Re JT Tobacconists*, 59 USPQ2d 1080, 1081 n. 2 (TTAB 2001); *In re Styleclick.com Inc.*, 57 USPQ2d 1445, 1446 n. 2 (TTAB 2000); *Raccioppi v. Apogee Inc.*, 47 USPQ2d 1368, 1370 (TTAB 1998); *In re Volvo Cars of North America Inc.*, 46 USPQ2d 1455 (TTAB 1998); *In re Broadway Chicken Inc.*, 38 USPQ2d 1559, 1560 n.6 (TTAB 1996); *Weyerhaeuser Co. v. Katz*, 24 USPQ2d 1230, 1231-32 (TTAB 1992).

However, even if the earlier filed application was properly made of record, the refusal to register on the principal register should be maintained. Prior decisions and actions of other trademark examining attorneys in registering different marks are without evidentiary value and are not binding upon the Office. Each case is decided on its own facts, and each mark stands on its own merits. *AMF Inc. v. American Leisure Products, Inc.*, 177 USPQ 268, 269 (C.C.P.A. 1973); *In re International Taste, Inc.*, 53 USPQ2d 1604 (TTAB 2000); *In re Sunmarks Inc.*, 32 USPQ2d 1470 (TTAB 1994); *In re National Novice Hockey League, Inc.*, 222 USPQ 638, 641 (TTAB 1984); *In re Consolidated Foods Corp.*, 200 USPQ 477 (TTAB 1978).

CONCLUSION

For the foregoing reasons, the refusal to register on the basis of Trademark Act Section 2(e)(1), 15 U.S.C. Section 1052(e)(1), for the reason that the proposed mark merely describes the identified services, should be affirmed.

Respectfully submitted,

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